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I. INTRODUCTION

In April 2002, the Supreme Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[1] the most recent case in which the Court attempted to define and clarify the limits of the regulatory takings doctrine arising under the Fifth Amendment.[2] One of the difficulties facing the Court in its effort to define regulatory takings is that "the Constitution contains no . . . reference to regulations that prohibit a property owner from making certain uses of her private property."[3] Rather, the Fifth Amendment's "plain language requires the payment of compensation whenever the government *acquires* private property for a public purpose, whether [by] condemnation . . . or . . . physical appropriation."[4] A regulatory taking has therefore been more difficult for the Supreme Court to define.[5] The Court has slowly defined the doctrine over time as it has approached the doctrine in the context of specific cases.[6]

In *Tahoe*, the Supreme Court addressed an aspect of regulatory takings that remained unclear in previous cases: "whether a moratorium on development imposed [by a government agency] during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation."[7] The *Tahoe* case pitted the interests of private landowners, who wanted to develop their land, against a government agency that temporarily prohibited all development in order to create guidelines to protect the pristine clarity and beauty of Lake

1. 122 S. Ct. 1465 (2002).

2. The Fifth Amendment states, in pertinent part, "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. In *Tahoe*, the Court recognized that its "jurisprudence involving condemnations and physical takings is as old as the Republic," but that its "regulatory takings jurisprudence, in contrast, is of more recent vintage." 122 S. Ct. at 1478.

3. *Tahoe*, 122 S. Ct. at 1478.

4. *Id.* (emphasis added).

5. *See* PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION, 59 (1998).

6. *Id.* ("[T]he [Supreme] Court has pursued the question [of land use regulation] on an almost annual basis since 1974.").

7. *Tahoe*, 122 S. Ct. at 1470.

Tahoe.[8] The *Tahoe* Court ultimately held that a complete prohibition on development is not a categorical taking when it is only temporary, and that such a moratorium is an important planning tool to aid government in proper planning and decision-making.[9] While the *Tahoe* Court emphasized that a temporary moratorium on development could be a compensable taking under the *Penn Central Transportation Co. v. City of New York*[10] balancing test,[11] the Court severely limited the categorical taking principal outlined in *Lucas v. South Carolina Coastal Council*[12] and basically gave local governments and planning agencies a way to sidestep the Fifth Amendment by making a temporary takings claim much more difficult to sustain.

However, instead of rejecting a categorical rule requiring compensation, the *Tahoe* Court should have adopted a rule allowing the government to completely ban all use during a one-year window while environmental planning takes place, but requiring the government to compensate for complete prohibitions on use that stretch beyond one year. Such a rule is superior to a *Penn Central* analysis because it allows a government to adequately protect the environment but also protects landowners from government action that completely destroys the economic value of their land, all while preserving efficiency and certainty in the land-use planning process.

In this Note, I will discuss several different rules that could have been applied to the use of "temporary" moratoria in *Tahoe* which may have better protected the landowners involved while still allowing the government to accomplish its important environmental planning and decision-making. In Part II of this Note, I provide the historical and environmental background for the *Tahoe* case. In Part III, I briefly outline the current state of the Supreme Court's Fifth Amendment takings jurisprudence, and critically analyze how the *Tahoe* Court applied and expanded regulatory takings law. In Part IV, I identify and discuss rules that could have been applied in *Tahoe,* and in Part V, I apply the best of these rules to the facts of *Tahoe* and show how a more favorable outcome was achievable. In Part VI, I conclude with some thoughts about how this rule may be applied in other settings.

8. *See id*. at 1470, 1473.

9. *Id*. at 1489.

10. 438 U.S. 104 (1978).

11. *See Tahoe*, 122 S. Ct. at 1489. "The *Penn Central* analysis involves a 'complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.'" *Id*. at 1475 n.10 (citing Palazzolo v. Rhode Island, 553 U.S. 606, 617 (2001).

12. 505 U.S. 1003 (1992).

II. THE DISPUTE

The dispute in *Tahoe* was over twenty years in the making.[13] After several decisions by the Ninth Circuit Court of Appeals,[14] the Supreme Court finally took up the case when the Ninth Circuit decided that temporary moratoria were not *per se* takings under the Fifth Amendment.[15] The case originally arose because Lake Tahoe's beauty enticed many people to acquire land surrounding the lake with the intent to eventually build recreational houses or retirement homes.[16] Unfortunately, the demand to build near the lake threatened the very reason it was such a popular location, its continued beauty.[17]

A. Lake Tahoe

To describe Lake Tahoe as an attractive body of water would be an extreme understatement. It provides a singular visual experience, regardless of the season, that is extraordinary. While many different commentators have attempted to describe the lake's beauty,[18] perhaps John Muir said it best when he called Lake Tahoe the "queen of lakes."[19]

13. That is, the government action creating the takings claims occurred over twenty years ago. *Tahoe*, 122 S. Ct. at 1470. If the time it took to create the striking beauty of Lake Tahoe is considered, this dispute has been in the making for millions of years.

14. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F.3d 753 (9th Cir. 1994); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 938 F.2d 153 (9th Cir. 1991); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 911 F.2d 1331 (9th Cir. 1990).

15. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 782 (9th Cir. 2000).

16. Petitioner's Brief at 2, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,122 S. Ct. 1465 (2002) (No. 00-1167).

17. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1232 (D. Nev. 1999).

18. The district court called Lake Tahoe "one of the wonders of the world," and further noted that Mark Twain called Lake Tahoe "the fairest picture the whole earth affords," that President Clinton called Lake Tahoe "a national treasure," that Vice President Gore said that "the beauty of [Lake Tahoe] is unique in all the world," and that the California Supreme Court referred to the Tahoe basin as "an area of unique and unsurpassed beauty." *Id.* at 1230.

19. Letter from John Muir to Dr. and Mrs. Carr (Nov. 3, 1873), *in* LETTERS TO A FRIEND: WRITTEN TO MRS. EZRA S. CARR, 1866-1879 (1915). In the same letter he also communicated his "highest pleasures," obtained as he

> sauntered through the piney woods, pausing countless times to absorb the blue glimpses of the lake, all so heavenly clean, so terrestrial yet so openly spiritual. . . . The soul of Indian summer is brooding this blue water, and it enters one's being as nothing else does. Tahoe is surely not one but many. As I curve around its heads and bays and look far out on its level sky fairly tinted and fading in pensive air, I am reminded of all the mountain lakes I ever knew, as if this were a kind of water heaven to which they all had come.

Id.

Even the *Tahoe* Court recognized "that Lake Tahoe is 'uniquely beautiful.'"[20]

Situated on the California/Nevada border, Lake Tahoe attracts thousands of people to its shores yearly.[21] Many of these people are drawn to the lake because of its "beautiful cobalt blue" color[22] and its extraordinary clarity that allows views of the lakebed up to 80 feet below the surface.[23] However, continued development on the lake's shores threatened to cloud the lake's clarity and change its color from a rich blue to a more mundane green through the process of eutrophication.[24] As development around the lake increases, so too does the amount of algae growth in the lake.[25] "Eventually, unless the process is stopped, the lake will lose its clarity and its trademark blue color."[26]

B. Attempts at Environmental Protection

Recognizing the problems associated with continued development, as well as those created by having two different states with jurisdiction over parts of the shore, Nevada and California agreed to establish the Tahoe Regional Planning Agency ("TRPA") with a goal to preserve the lake.[27] Eventually TRPA was given authority to develop environmental threshold carrying capacities that would adequately protect the lake from the harms of development.[28] The process undertaken by TRPA, which included issuing a complete moratorium on development until the standards could be created, and later issuing a second complete moratorium when the standards were not created in time, created a thirty-

20. *Tahoe*, 122 S. Ct. at 1470 (quoting *Tahoe*, 34 F. Supp. 2d 1226, 1230 (D. Nev. 1999)).

21. UNITED STATES DEPARTMENT OF THE INTERIOR - UNITED STATES GEOLOGICAL SURVEY, STREAM AND GROUND-WATER MONITORING PROGRAM, LAKE TAHOE BASIN, NEVADA AND CALIFORNIA 1 (1997), *available at* http://water.usgs.gov/pubs/FS/FS-100-97/fs-100-97.pdf. The lake's location, about 150 miles from the San Francisco Bay Area and only 80 miles from the Sacramento Valley, places the lake in relatively close proximity to approximately 8 million people. *Id.* Recreational opportunities include casino gambling in Nevada, skiing, golfing, water sports, hiking, fishing, camping, and backpacking. *Id.*

22. *Tahoe*, 34 F. Supp. 2d at 1230.

23. *Id.* In addition, the *Tahoe* Court noted that "'Mark Twain aptly described the clarity of [the lake's] waters as 'not *merely* transparent, but dazzlingly, brilliantly so.'" *Tahoe*, 122 S. Ct. at 1470-71 (quoting *Tahoe*, 34 F. Supp. 2d. at 1230).

24. *Tahoe*, 34 F. Supp. 2d at 1231.

25. Increased algae growth is a result of more nutrients in the water. Water entering the lake after being collected on asphalt or concrete surfaces does not undergo the natural filtration process that has kept nutrients out of the lake for so many years. Thus, as development increases, filtration decreases, introducing more nutrients into the water and ultimately allowing algae to grow more abundantly. *See id*.

26. *Id.* The district court also noted that "[e]stimates are that, should the lake turn green, it could take over 700 years for it to return to its natural state, if that were ever possible at all." *Id.*

27. *Id.* at 1232.

28. *Id*.

two month period during which development was completely prohibited. It is this thirty-two month period that was considered by the *Tahoe* Court.[29] In reality, many of the landowners are still prohibited from building on their land, due to a variety of factors that can all be traced back to TRPA's actions but that were not considered by the *Tahoe* Court.[30]

C. The Case Below

In 1999, the Federal District Court for the District of Nevada held that the petitioners had been denied all economic use of their land during the thirty-two month period and were entitled to compensation because the moratoria constituted a categorical taking under *Lucas*.[31] TRPA appealed this decision and the Ninth Circuit reversed, holding that *Lucas* could not be applied to a temporary taking.[32] It held that the proper framework for determining whether a taking had occurred was the balancing test outlined in *Penn Central*.[33] However, the district court had held that under *Penn Central* no taking had occurred and the petitioners failed to appeal that holding.[34] Therefore, on appeal to the Supreme Court the petitioners were limited to arguing that *Lucas* should apply to temporary regulations.[35]

D. The Decision

The *Tahoe* Court agreed with the Ninth Circuit and held that temporary moratoria were not categorical takings under *Lucas* because,

29. 122 S. Ct. 1465, 1473 (2002).

30. Petitioners' Brief at 2-7, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-1167). Justice Rehnquist, in his dissent in *Tahoe*, argued that the Court should have considered as part of the taking an additional three year period after the moratoria were lifted when the petitioners were prohibited from building by an injunction issued as a result of a lawsuit over TRPA's final plan promulgated in 1984. 122 S. Ct. at 1490-91 (Rehnquist, C.J., dissenting). The *Tahoe* majority refused to do so, arguing that the Court's grant of certiorari did not encompass this time period and that it was not covered in the briefs or in oral argument. *Id.* at 1474 n.8. In addition, the final plan adopted in 1987 permanently prohibited many petitioners from building as well, and could likely be considered a categorical taking under a *Lucas* analysis. However, the petitioners failed to amend their complaint to include the claim regarding the 1987 plan until 1991. *Id.* at 1474 n.7. The district court found that this claim was barred by applicable statutes of limitations and therefore the *Tahoe* Court refused to consider this time period as well. *Id.*

31. *Tahoe*, 34 F. Supp. 2d at 1245.

32. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 782 (2000).

33. *Id.*

34. Petitioners' failure to appeal the district court's *Penn Central* holding, and failure to timely amend their complaint to include the 1987 plan suggest that attorney error may have contributed to the ultimate outcome.

35. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1485 (2002).

when the property was considered as a whole, the temporary moratoria did not deprive the owners of all economic value of the land.[36] The *Tahoe* Court explained that when the government fails to burden the whole parcel, the balancing analysis set forth in *Penn Central Transportation Co. v. New York*[37] is required to establish a taking.[38] Further, the Supreme Court rejected the landowners' arguments that fairness and justice required the government to compensate the petitioners for shouldering a burden that benefited the entire public because a rule based on fairness would severely limit the use of moratoria by planning agencies and deprive both the public and the landowners of the benefits of the planning accomplished during such moratoria.[39]

III. REGULATORY TAKINGS JURISPRUDENCE

In order to understand the *Tahoe* Court's decision, one must firmly grasp the concept of regulatory takings as it has been disseminated from the Supreme Court and set forth in the *Tahoe* decision.

A. Established Regulatory Takings Law

Understanding the difference between a regulatory taking and a physical taking is critical to comprehending regulatory takings law. A physical taking categorically requires compensation be paid to the landowner based on the text of the Fifth Amendment because land is "taken" by the government for some public or government benefit.[40] A regulatory taking is not an actual physical invasion, however, but a restriction to a certain degree on a landholder's right to use the land in a certain way.[41] The Supreme Court has not categorically required

36. *Id*. Specifically, the Court said:

> [A] permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary taking prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.

Id. at 1484.

37. 438 U.S. 104 (1978).

38. *Tahoe*, 122 S. Ct. at 1483-84. Specifically the Court said: "The starting point for the . . . analysis should [be] to ask whether there [is] a total taking of the entire parcel; if not, then *Penn Central* [is] the proper framework." *Id.*

39. *Id.* at 1484-90 (2002).

40. *Id.* at 1478-79. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Id.* at 1478.

41. *See id.* at 1479 ("[A] government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, Block v. Hirsch, 256 U.S. 135 (1921); that bans certain private uses of a portion of an owner's property, Village of Euclid v. Amber Realt Co., 272 U.S. 365

compensation for a regulatory taking, but rather has engaged in an "essentially ad hoc, factual inquir[y] designed to allow careful examination and weighing of all relevant circumstances."[42] The difference between physical takings and regulatory takings "makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking."[43]

The *Tahoe* Court noted that the regulatory takings doctrine had its inception in Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*.[44] Justice Holmes recognized that "if regulation goes too far it will be recognized as a taking."[45] *Mahon* held that a coal mining company was entitled to compensation when the state passed a statute prohibiting such companies from mining in a way so as to cause subsidence of structures on the surface, despite the fact that the coal company acquired the rights through a valid contract.[46] The *Tahoe* Court noted that while the *Mahon* Court "did not provide a standard for determining when a regulation goes 'too far,' [it] did reject the view expressed in [the *Mahon*] dissent that there could not be a taking because the property remained in the possession of the owner and had not been appropriated or used by the public."[47]

The *Tahoe* Court also stated that "[i]n the decades following [the *Mahon*] decision, [the Supreme Court has] generally eschewed any set formula for determining how far is too far, choosing instead to engage in essentially ad hoc, factual inquiries."[48] These inquiries focused on the parcel as a whole.

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[49]

(1926); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987); or that forbids the private use of certain airspace, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), does not constitute a categorical taking.").

42. *Id.* at 1478. (internal citations omitted).

43. *Id.* at 1479.

44. *Id.* at 1480 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

45. *Mahon*, 260 U.S. at 415.

46. *Id*. at 415-16.

47. *Tahoe*, 122 S. Ct. at 1480-814.

48. *Id.* at 1481 (internal quotation omitted).

49. *Penn Central*, 438 U.S. 104, 130-31 (1978) (internal quotation omitted). Viewing the property "as a whole" allows the government to argue that while a regulation may destroy some of the rights associated with the property, some rights will remain. This appears to lessen the strength

The *Tahoe* Court stated that "'where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking.'"[50]

While recognizing that "[t]reating [all regulatory takings claims] as *per se* takings would transform government regulation into a luxury few governments could afford,"[51] the *Tahoe* Court did recognize at least one case, *Lucas v. South Carolina Coastal Council*,[52] in which a categorical *per se* taking rule was applied to a regulatory taking situation.[53] In addition, the *Tahoe* Court was forced to distinguish another case,[54] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[55] in which language suggested that temporary takings were no different from permanent takings and also subject to a categorical *per se* taking rule.[56]

In *Lucas v. South Carolina Coastal Commission*, the Supreme Court held that a regulation that deprived a landowner of all economic value of his land was entitled to compensation because a categorical taking had occurred.[57] The facts in *Lucas* are similar to the facts in *Tahoe*. Both cases involved landowners who wished to build homes on land that a government agency considered to be environmentally sensitive. In *Lucas*, the land was located on a seashore that was slowly eroding into the sea because of development.[58] However, the main difference between the cases, and the difference that the *Tahoe* Court emphasized, was that the regulation in *Lucas* was a permanent regulation.[59] As long as the regulation was in force, the landowner was prohibited from making any use of his land. In *Tahoe*, however, the Court called the regulation

of the *Penn Central* test and makes it harder for a property owner to prevail under *Penn Central*. *See* SALSICH & TRYNIECKI, *supra* note 5, 68-69.

50. *Tahoe*, 122 S. Ct. at 1481 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)). Salsich & Tryniecki argue that it may be possible to classify property interests in such a way to make sense of the Supreme Court's reaction to different regulations. *See supra* note 5, 72-75.

51. *Tahoe*, 122 S. Ct. at 1479.

52. 505 U.S. 1003 (1992).

53. *Tahoe*, 122 S. Ct. at 1480 (referring to the holding in *Lucas* as "a regulatory takings case that, nevertheless, applied a categorical rule").

54. *Id.* at 1482 ("Thus, our decision in *First English* surely did not approve, and implicitly rejected, the categorical submission that petitioners are now advocating.").

55. 482 U.S. 304 (1987).

56. *Id.* at 318 ("temporary takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation").

57. *See Tahoe*, 122 S. Ct. at 1483 ("The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of all economically beneficial uses of his land.").

58. Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1008-09 (1992).

59. *Tahoe*, 122 S. Ct. at 1482-83. "As the statute [in *Lucas*] read at the time of the trial, it effected a taking that was unconditional and permanent." *Id.*

temporary because it was limited to a thirty-two month period. In discussing *Lucas* the Court stated, "Certainly, our holding that the *permanent* obliteration of the value of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of land for *a 32-month period* has the same legal effect."[60]

The *Tahoe* Court was also forced to distinguish *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[61] because the petitioners in *Tahoe* argued that *First English* stood for the proposition that "[t]emporary takings . . . are not different in kind from permanent takings."[62] However, the *Tahoe* Court emphasized that *First English* did not address the question of whether a temporary prohibition on the use of land constituted a compensable taking under the Fifth Amendment. Rather *First English* held that "'where the government's activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'"[63]

B. Criticism of the Tahoe Holding

One problem with the *Tahoe* holding is that it is based entirely on an artificial distinction between temporary and permanent moratoria. The *Tahoe* Court is forced to engage in analytical dancing to get around the problems posed by *Lucas*, regarding a temporary taking as opposed to a permanent taking. Chief Justice Rehnquist, in his dissent, criticized the Court's failure to apply *Lucas* because "the deprivation was 'temporary.'"[64] He stated:

> Neither the Takings Clause nor our case law supports such a distinction. For one thing, a distinction between "temporary" and "permanent" prohibitions is tenuous. The "temporary" prohibition in this case that the Court finds is not a taking lasted almost six years. The "permanent" prohibition that the Court held to be a taking in *Lucas* lasted less than two years . . . because the law, as it often does, changed. . . . Under the Court's decision today, the takings question

60. *Id.* at 1483 (emphasis added) (internal quotation omitted).

61. 482 U.S. 304 (1987).

62. Petitioner's Brief at 11, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-1167).

63. *Tahoe*, 122 S. Ct. at 1482 (quoting *First English*, 482 U.S. at 321). While the *Tahoe* Court's arguments regarding *First English* do make some sense, in that the case was not deciding whether a temporary prohibition on use was a taking, the language from *First English* can be seen as support for the argument that the temporal property right, i.e., the right to use the property now as opposed to later, is one of the more important strands in the bundle of property rights.

64. *Id.* at 1492 (Rehnquist, C.J., dissenting).

> turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development "temporary," or to fix a set number of years. . . . The Court now holds that such a designation by the government is conclusive even though in fact the moratorium greatly exceeds the time initially specified. Apparently, the Court would not view even a 10-year moratorium as a taking under *Lucas* because the moratorium is not "permanent."[65]

As Chief Justice Rehnquist pointed out, the distinction does not make sense, especially when a temporary taking can become permanent and a permanent taking can become temporary, simply based on what a legislature decides to call the regulation. For instance, in *Lucas* the taking was permanent because the statute did not have any expiration date. However, the legislature made the regulation temporary by rescinding the regulation. Despite this recission, the Supreme Court still found that a taking had occurred. On the other hand, in *Tahoe*, the governmental agency categorized its regulation as temporary. Still, subsequent action by the governmental agency all but made the taking permanent. Essentially, in *Lucas* a temporary regulation was held to be a taking, whereas in *Tahoe* a permanent regulation was not.

Chief Justice Rehnquist also compared a temporary taking to a leasehold taken by the government until it decides what to do with the property. "Surely [a] leasehold would require compensation."[66] He hypothesized that

> what happened in this case is no different than if the government had taken a 6-year lease of [the petitioners] property. The Court ignores this practical equivalence between respondent's deprivation and the deprivation resulting from a leasehold. In so doing, the Court allows the government to do by regulation what it cannot do through eminent domain—i.e., take private property without paying for it.[67]

Perhaps a consistent use of the word "temporary" would have helped the *Tahoe* Court. "Temporary" can be used in at least two different ways when describing a regulation. First, "temporary" can describe the intended effect of the regulation. Used this way, a "temporary" regulation is one, such as a moratorium on development to allow better environmental planning and decision-making, that expires once the planning and decision-making is complete and permanent regulations are promulgated. Second, "temporary" can describe the actual effects of a regulation. A regulation intended to be permanent can quickly become

65. *Id.*
66. *Id*. at 1493.
67. *Id*. (internal quotations omitted).

"temporary" in its effect if the government body decides to repeal the regulation, such as in *Lucas*. Likewise, a regulation intended to be temporary can become permanent, if the government body decides to make the regulation permanent or if the government fails to take the steps necessary to make the "temporary" regulation expire. In the *Tahoe* case, the regulation was characterized by TRPA as temporary moratoria designed to allow better environmental planning and decision-making.[68] However, the temporary moratoria quickly became permanent when TRPA failed to meet its deadlines and then eventually passed permanent regulations with the same effect as the temporary moratoria. However, the *Tahoe* Court ignored this effect and ruled on the moratoria as if they were only in place for thirty-two months.

In addition to relying on a tenuous distinction between temporary and permanent, the *Tahoe* Court failed to recognize that temporal property rights are likely more important than any other property rights that make up the bundle of rights enjoyed by a landowner. In his dissent in *First English*, Justice Stevens characterized land use regulations as

> three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally . . . regulations set forth the duration of the restrictions.[69]

Another commentator has characterized these three dimensions as "temporal, extent, and intensity."[70] When a landowner is prohibited from using his property in a certain way, the landowner is not as concerned with how he will be able to use his land next year, as he is concerned with how he can use his land now. Both the language from *First English*, stating that temporary takings "are not different in kind from permanent takings,"[71] and Chief Justice Rehnquist's dissent in *Tahoe* suggest that the temporal dimension of property rights may be the most important strand in the property bundle. Chief Justice Rehnquist argues that the Court should consider regulatory takings "from the landowner's point of view."[72] Clearly, from the landowner's point of view, the most important rights are the rights to do what the landowner needs right now, not five years in the future.

68. Respondents' Brief at 8-9, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-1167).

69. 482 U.S. 304, 330 (1987) (Stevens, J., dissenting).

70. STEVEN J. EAGLE, REGULATORY TAKINGS, §8-2(h)(4) (1996).

71. 482 U.S. at 305.

72. *Tahoe*, 122 S. Ct. at 1492.

A final problem with the *Tahoe* decision is that the Court refused to recognize that the landowners in *Tahoe* are still prohibited from making any use of their land. The Court seemed to purposely limit its holding in an effort to further define regulatory takings, without taking into consideration the actual effects of the case. While the *Tahoe* Court noted that it could "characterize the successive actions of TRPA as a series of rolling moratoria that were the functional equivalent of a permanent taking,"[73] the Court purposely limited its review to the thirty-two month period, effectively eliminating this option. The Court should have at least considered the fact that most of the petitioners have still not been allowed to build on their land. Further, the *Tahoe* Court suggested that it could have "concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the [original government action]."[74] However, the Court noted that the district court found that TRPA had acted reasonably in its delay.[75] In addition, the *Tahoe* Court suggested that it could have held that the moratoria did not substantially advance a legitimate state interest, but the petitioners did not argue that the state interest was not substantial.[76] Finally, the *Tahoe* Court noted that it could have analyzed the takings under *Penn Central*, but unfortunately for the petitioners, they failed to appeal the district court's holding that under *Penn Central* no taking had occurred.[77]

IV. POSSIBLE RULES AVAILABLE TO THE *TAHOE* COURT

The *Tahoe* Court identified at least three different rules that it could have used to find that TRPA's actions created a categorical taking.[78] First, the *Tahoe* Court could have created a "categorical rule that . . . compensation is required whenever government temporarily deprives an owner of all economically viable use of [the] property."[79] Second, the *Tahoe* Court could have "craft[ed] a narrower rule that would cover all temporary land-use restrictions except those normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[80] Finally, the *Tahoe* Court could have "adopt[ed] a rule . . . that would allow a short fixed period for deliberations to take place without

73. *Id.* at 1485 (internal quotation omitted).
74. *Id*.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 1484-85.
79. *Id.* at 1484.
80. *Id.* (internal quotation omitted).

compensation . . . after which the just compensation requirements would kick in."[81]

While the *Tahoe* Court promptly rejected each of these options, further consideration of these rules suggests that, ultimately, a rule that requires compensation for all *complete* bans on property use, whether temporary or permanent, appropriately balances the interests of landowners and government, and does so in a categorical way, making land use planning much more certain for both governments and landowners. However, because such a rule would have a large effect on current land use planning tools, such as temporary moratoria, the *Tahoe* Court should have imposed the categorical rule with a one-year window, during which compensation would not be required.[82] Only when the temporary moratoria extends beyond the compensation-free window should compensation be required.

A. Complete Categorical Taking Rule

The *Tahoe* Court rejected a categorical rule requiring compensation for a temporary taking for several reasons. The Court was concerned that such a rule "would apply to numerous normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damage buildings, or other areas that we cannot now foresee," and that "[s]uch a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power."[83] However, such a categorical rule does not have to have such an effect because a categorical rule does not apply to every situation in which the government is forced to interfere with private property. In most situations, including the situations identified by the *Tahoe* Court, some uses are still allowed that have some value to the landowner. For instance, the *Tahoe* Court identifies "orders . . . prohibiting access to crime scenes, businesses that violate health codes, [and] fire-damaged buildings" as requiring compensation under a categorical rule.[84] However, clearly these situations do not have the same prohibitive effect as a complete prohibition on use. While a landowner may not be able to enter the land

81. *Id.*

82. My selection of a one-year window is somewhat arbitrary. It seems that a one-year delay would not foreclose development opportunities for the landowners and would also give government a substantial period of time to plan. Arguments can certainly be made that the window should be shorter or longer without destroying the window concept.

83. *Tahoe*, 122 S. Ct. at 1485 (internal quotation omitted).

84. *Id.*

temporarily, the landowner can still make use of the land enough to be able to sell it for close to market value. A complete prohibition on use has the effect of driving the market value of the land down to a point where the land is virtually valueless.

In addition, in its amicus brief in the *Tahoe* case, the Washington Legal Foundation pointed out that municipalities do not need to prohibit all development of undeveloped land "in order to preserve the status quo during the planning process."[85] It also stated that

> there are many kinds of interim development ordinances available to slow down development and prevent land development that would conflict in any way with the permanent legal controls that will ultimately be adopted. For example, municipalities can temporarily restrict the rezoning of new land or issuance of new subdivision approvals or decline to issue permits for "tear-downs" and construction of new, larger houses. Such moratoria would continue to be evaluated under the *ad hoc* balancing test of *Penn Central Transportation Co. v. New York City*. . . . Prohibitions on all use of undeveloped land are only one subset of the types of moratoria in use and present issues dramatically different from land use regulations that permit some beneficial use.[86]

This text suggests that a temporary moratorium on *all beneficial use* is a natural point at which to distinguish between a categorical taking and a *Penn Central* taking. When the moratoria is only on certain aspects of development, such as large commercial development, or even large-scale residential development, a categorical taking is not achieved. Small landowners can still build or at least plan on building in the near future.

The *Tahoe* Court was also concerned that a categorical rule would create hasty decision-making because "the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether."[87] While the Court is correct in recognizing that decision-making would need to be undertaken in a quicker fashion than is now typically done, this incentive is not necessarily a bad one. The government would have an incentive to quickly put in place appropriate standards in order to prevent continued harm to the environment. Of course these standards would be subject to review in the same way every other standard is subject to judicial review. Therefore, the standards

85. Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 18, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-167).

86. *Id.* at 19 (internal quotations omitted).

87. *Tahoe*, 122 S. Ct. at 1487-88.

would have to be good standards. There is no reason why government should not be able to undergo quick rulemaking, and at the same time make the rule a good one.

In addition, the *Tahoe* Court was concerned that "[t]o the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth."[88] However, quick development would not have the effect the Court was worried about. Certainly it will not benefit the environment, but when the effects of development undertaken before any regulations are considered are compared with the effects of any development during the time when the regulations are considered, the additional harm is likely to be very little. For example, Lake Tahoe was subject to development for many, many years before TRPA considered the new standards in 1981.[89] While that development was certainly harmful to the lake, continued development for three years while TRPA considered the new standards probably would not have damaged the lake much more than it was already damaged. A categorical rule, therefore, would not irreparably harm the environment but would give landowners the benefit of using their land.

A categorical rule is the better rule because it does not hinge on a tenuous distinction between a temporary and a permanent ban on development. In addition, as a categorical rule applied the same in all situations, it can bring certainty to the process, rather than a balancing test that leaves the determination up to the reviewing court. Further, it allows the government to determine what the most important issues are and to pay for the resolution of those issues that impact landowners.

One of the main arguments presented by the petitioners in the *Tahoe* case was that TRPA was seeking to benefit the entire Tahoe Basin by protecting the environment, but requiring only the landowners that had not yet developed their land to bear the burden of that environmental protection.[90] This argument is derived from language in *Armstrong v. United States* that says the Takings Clause of the Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[91] All the parties agreed that protecting Lake Tahoe was an important government interest, an interest likely shared by most

88. *Id.* at 1488.

89. *Id.* at 1471-72.

90. Petitioners' Brief at 34, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-1167).

91. 364 U.S. 40, 49 (1960).

of the public.[92] However, this interest in protecting Lake Tahoe should not have been placed on the undeveloped landowners alone.

B. Normal Planning Delays Rule

While the categorical rule is superior to a *Penn Central* analysis even with no planning window, most of the concerns identified by the *Tahoe* Court are minimized by prohibiting all use of land for a specified time period while allowing government a window of time in which it can plan without paying compensation. As the *Tahoe* Court noted, the length of the window can either be based on the length of normal planning delays or based on a blanket rule allowing only for planning within a set period of time.[93] However, for the reasons discussed below, a set one-year window is the better option.

First, the *Tahoe* Court considered a rule that would allow for normal planning delays without requiring compensation, such as a permit.[94] However, the Court dismissed this rule because "it would still impose serious financial constraints on the planning process."[95]

It should initially be noted that a categorical rule would not apply to most situations in which a permit was all that stood in the way of the landowner. Restricting development while a party is seeking a permit is different from a complete ban on all development while environmental standards are developed. The Washington Legal Foundation pointed out that "the normal delays in processing applications for permits or variances are "'incidents of ownership [that] cannot be considered as a 'taking' in the constitutional sense.'"[96]

Most importantly, as the Washington Legal Foundation recognized, "normal delays in processing a development application are not compensable because an estate in real property has never been understood to include the right to develop the property without prior government review; such rights are 'not part of [the landowner's] title to begin with.'"[97] However, when a landowner complies with existing zoning restrictions, "basic fairness requires that the cost of those delays be borne by the citizenry as a whole rather than by the individual property owner."[98]

92. *Tahoe*, 122 S. Ct. at 1470.

93. *Id*. at 1484.

94. *Id*.

95. *Id.* at 1486.

96. Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 20, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-167) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980)).

97. *Id.*

98. *Id.*

The *Tahoe* Court criticized the petitioners for "fail[ing] to offer a persuasive explanation for why moratoria should be treated differently from ordinary permit delays."[99] However, the Court is wrong in failing to be persuaded by the petitioners' arguments regarding the difference between moratoria and ordinary permit delays. The petitioners argued "that a permit applicant need only comply with certain specific requirements in order to receive one and can expect to develop at the end of the process, whereas there is nothing the landowner subject to a moratorium can do but wait, with no guarantee that a permit will be granted at the end of the process."[100] The *Tahoe* Court claimed that "petitioners' argument breaks down under closer examination because there is no guarantee that a permit will be granted, or that a decision will be made within a year."[101] However, as the petitioners argued, ordinary permits are available to anyone who complies with certain requirements. Once compliance is achieved, the permit will be issued and development can continue. Any refusal to grant a permit to a complying party will result in legal action to determine if the denial was an abuse of discretion on the agency's part. On the other hand, a moratorium is decidedly less certain. The agency can simply continue to extend the moratorium, even if its purposes are in good faith, and continue to deprive the landowner of the use of the land.

However, the *Tahoe* Court's criticisms of the petitioners' attempts to distinguish between a "normal" permit delay and a complete moratorium on use of any kind suggest that a window of time based on "normal" processes may be difficult to sustain. Such a rule would be left up to the deciding court to define on a case-by-case basis and would therefore lose the efficiency of a categorical rule. A window allowing for a set amount of time is therefore more desirable.

C. Fixed Planning Period Rule

The *Tahoe* Court noted that it "could adopt a rule . . . that would allow a short fixed period for deliberations to take place without compensation . . . after which the just compensation requirements would kick in."[102] However, it expressed the same concerns with this option that it had with the previous two options.

A categorical rule that has a fixed time period during which compensation is not required, for purposes of this article a one-year time

99. *Tahoe*, 122 S. Ct. at 1486-487 n.31.

100. *Id.*

101. *Id*.

102. *Id.* at 1484.

period, has as its advantage the efficiency of a categorical rule without an exception that would destroy the efficiency. It also allows both landowners and government agencies to plan with certainty, knowing that after a year either the regulations will be in place or compensation will be due. In addition, it allows the government to prioritize its planning, making sure that any planning that should not take a year gets accomplished so that compensation does not have to be paid. The government would then be able to identify those projects that do have a large benefit to the public at large and target those projects for more expansive planning. In this situation, justice and fairness suggest that compensation is due to the landowners anyway because the burden on the landowners benefits the public.

One last criticism of the categorical rule with a one-year period in which no compensation is due is that such a rule should not be judicially created. The *Tahoe* Court noted that the legislature should have a large role in creating such a rule.[103] However, the Supreme Court can have a role in creating such a rule. To maintain a proper balance between the judiciary and the legislature, the first step in creating such a rule would be for the Supreme Court to hold that all complete bans on use, even if temporary, constitute takings. Then, a state or local legislature could challenge that rule by statutorily allowing the state or local government to be free of compensation requirements for the one-year period. If landowners or other concerned citizens challenged the statutory rule, then the Supreme Court could rule that the proper balance between environmental planning and individual land ownership has been met. Unfortunately, the Supreme Court failed to begin the process when it held that a complete ban on all use did not constitute a taking because it was temporary.

V. CATEGORICAL RULE APPLIED TO THE FACTS OF *TAHOE*

Had a categorical rule been in place before TRPA attempted to impose the moratoria, the landowner's interests would have been protected. In addition, it is unlikely that the clarity and pristine beauty of Lake Tahoe would have been diminished in any great way. TRPA would have still been able to develop its standards for the future protection of Lake Tahoe, only it would have had an incentive to develop the standards within the one year period.

The petitioners either would have been able to build on their property after a year, or would have been entitled to compensation. Because most

103. *Id.* at 1489 ("[f]ormulating a general rule of this kind is a suitable task for state legislatures").

of the petitioners were only seeking to do what their neighbors had done, build residential homes, they would have realized their goals and enjoyed the beauty of Lake Tahoe. Lake Tahoe would not have suffered in any great way because TRPA would still have been free to develop standards for future development. The standards were eventually created by TRPA and continued the prohibition on much of the land involved in this case. TRPA was able to develop its standards by 1984, thus only the development from the period of 1981 to 1984 would have had an effect on the Lake. This additional four years certainly would not have helped the lake, but its effects would not have destroyed the lake either. Either this four years of continued development, or the reasonable value of a leasehold on the landowners land is the price the government should have been forced to pay in order to protect Lake Tahoe to the extent that it did. Because development would have continued, TRPA would have had an incentive to quickly put in place reasonable permanent standards to protect the lake. Quick decision-making does not have to be hasty. Once the standards were in place, landowners could either comply with the standards or sell their land, or, if the standards deprived the landowners of all economic use of the land, the landowners could have sought the value of the land under *Lucas*.

VI. CONCLUSION

The *Tahoe* case stands for the new regulatory takings principle that a temporary moratorium cannot be decided under *Lucas* as a categorical taking but must instead be evaluated under the *Penn Central* balancing test. While a landowner can still recover under *Penn Central*, such a recovery will be harder to come by because of the evidentiary requirements necessary to establish the existence of the *Penn Central* factors and the difficulties in defining the parcel as a whole.

As this holding is applied to future litigation, parties will be unsure exactly how far the Court is willing to go, or what they will have to prove. For instance, can a twenty-year "temporary" moratorium, with no sign of ending, be considered a categorical taking under *Tahoe*, or will the Court put its foot down and declare that this is just too long for government to take in its planning? What if the twenty-year moratorium is done in good faith, with the planning agency sincerely attempting to develop standards that will allow building? Will this determination of good faith preclude a categorical taking? Clearly, litigants challenging such moratoria in the future would do well to challenge the moratorium under *Penn Central* as well as *Lucas*. While the court may have showed an inclination to limit *Lucas*, it is by no means clear that this will be the ultimate state of affairs on regulatory takings jurisprudence.

If justice and fairness have any effect on regulatory takings jurisprudence, cases like *Tahoe* should be decided in the landowners' favor because it is patently unfair for a limited number of landowners to bear the burden of protecting the environment. While protecting the environment should be given a high priority, so should protecting landowners from intrusion by the government.

One thing is clear after *Tahoe*. The ability of a government planning agency to prohibit development is much easier. The agency only has to declare a "temporary" moratorium and it can get around the takings prohibition imposed by the Fifth Amendment. For landowners seeking to develop their land this could be disastrous. Prospective purchasers of land, beware—the government now has at its disposal a means to permanently deprive you of the ability to develop your land. Fee simple has become much more complex.

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